Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-563

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTONIO CIPOLLONE, Individually and as Executor of the Estate of ROSE D. CIPOLLONE, PETITIONER

v.

LIGGETT GROUP, INC., A Delaware Corporation; PHILIP MORRIS INCORPORATED, A Virginia Corporation; and LOEW'S THEATRES, INC., A New York Corporation

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In our brief in opposition to the petition, we advised the Court, *inter alia*, that the decision below is interlocutory because the court of appeals remanded the case to the district court for the purpose of determining which of petitioner's eight causes of action are or are not preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.* See Br. in Opp. 16. On

December 9, 1986 (the day after we filed our opposition), the district court issued its opinion on remand, in which it dismissed five of petitioner's causes of action in their entirety, dismissed portions of two other causes of action, ruled that certain of petitioner's claims required further factual development before the court would be in a position to rule on preemption, and, finally, held that portions of petitioner's claims are not preempted. The district court's order is accompanied by an opinion explaining its reasoning, and we are lodging a copy of the order and opinion with the Clerk of this Court.

Although the district court has thus undertaken the reconsideration ordered by the court of appeals, it remains the case that this litigation is in an interlocutory posture. Unless appeal is now sought under Fed. R. Civ. P. 54(b) or 28 U.S.C. 1292(b), the case will proceed in the district court on those of petitioner's claims that the district court has held not to be preempted. We therefore adhere to our view that, there being no conflict among the circuits, review by this Court of the court of appeals' decision would be premature at this time.

We note, finally, that the district court's opinion is replete with hostile and extravagant characterizations of the meaning and scope of the court of appeals' decision in this case. Many of these characterizations are erroneous and unacceptable, but it plainly would be inappropriate for respondents in this Court to seek to correct them. We point out, simply, that it is the court of appeals' judgment, and not the district court's rhetorical gloss on the Third Circuit's opinion, that is before this Court for review.

Respectfully submitted,

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